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8 TRACYE BENARD WASHINGTON,
9 Plaintiff,
10 v.
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12 J. SERRATO, et al.,
13 Defendants.
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16 Case No. 22-cv-05832 BLF (PR)
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ORDER STRIKING NON-COGNIZABLE CLAIMS AND OF SERVICE; DIRECTING DEFENDANTS TO FILE DISPOSITIVE MOTION OR NOTICE REGARDING SUCH MOTION; INSTRUCTIONS TO CLERK

19 Plaintiff, a California inmate, filed the instant *pro se* civil rights action pursuant to
20 42 U.S.C. § 1983 against prison staff at Salinas Valley State Prison (“SVSP”) where he
21 was formerly housed. Dkt. No. 1-1. On March 28, 2023, the Court screened the complaint
22 and found some cognizable claims and dismissed some claims with leave to amend; claims
23 against several Defendants in their official capacity were dismissed as barred by the
24 Eleventh Amendment. Dkt. No. 7. Plaintiff has filed notice that he wishes to proceed
25 solely on the cognizable claims. Dkt. No. 8. Accordingly, this matter shall proceed as
discussed below.

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DISCUSSION

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I. Standard of Review

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A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See 28 U.S.C. § 1915A(a)*. In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *See id. § 1915A(b)(1),(2)*. Pro se pleadings must, however, be liberally construed. *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

II. Plaintiff’s Claims

Based on the allegations in the complaint, the Court found the complaint stated the following cognizable claims: (1) excessive force claims against Defendants Serrato, Guijarro, and Akin; and (2) conspiracy to commit assault against Defendants Serrato, Guijarro, Akin, and Diaz. Dkt. No. 7 at 11. Accordingly, this action shall proceed on these claims as discussed in the Court’s initial screening order. All other claims shall be stricken from this action.

CONCLUSION

For the foregoing reasons, the Court orders as follows:

1. The following claims shall be **STRICKEN** from the complaint: (1) ADA/RA claim against all Defendants; (2) equal protection claim against all Defendants; and (3) due process claims against Defendants Diaz and Akin.

2. The following Defendants shall be served at Salinas Valley State Prison:

a. **Officer J. Serrato**

b. **Officer E. Guijarro**

c. **Officer B. Akin**

d. **Office C. Diaz**

Service on the listed defendant(s) shall proceed under the California Department of Corrections and Rehabilitation's (CDCR) e-service program for civil rights cases from prisoners in CDCR custody. In accordance with the program, the clerk is directed to serve on CDCR via email the following documents: the operative complaint and any attachments thereto, Dkt. No. 1, the Court's initial screening order, Dkt. No. 7, this order of service, and a CDCR Report of E-Service Waiver form. The clerk also shall serve a copy of this order on the plaintiff.

No later than 40 days after service of this order via email on CDCR, CDCR shall provide the court a completed CDCR Report of E-Service Waiver advising the court which defendant(s) listed in this order will be waiving service of process without the need for service by the United States Marshal Service (USMS) and which defendant(s) decline to waive service or could not be reached. CDCR also shall provide a copy of the CDCR Report of E-Service Waiver to the California Attorney General's Office which, within 21 days, shall file with the court a waiver of service of process for the defendant(s) who are waiving service.

Upon receipt of the CDCR Report of E-Service Waiver, the clerk shall prepare for each defendant who has not waived service according to the CDCR Report of E-Service Waiver a USM-205 Form. The clerk shall provide to the USMS the completed USM-205 forms and copies of this order, the summons and the operative complaint for service upon each defendant who has not waived service. The clerk also shall provide to the USMS a copy of the CDCR Report of E-Service Waiver.

3. No later than **ninety-one (91) days** from the date this order is filed,

1 Defendants shall file a motion for summary judgment or other dispositive motion with
2 respect to the claims in the complaint found to be cognizable above.

3 a. Any motion for summary judgment shall be supported by adequate
4 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
5 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor
6 qualified immunity found, if material facts are in dispute. If any Defendant is of the
7 opinion that this case cannot be resolved by summary judgment, he shall so inform the
8 Court prior to the date the summary judgment motion is due.

9 b. **In the event Defendants file a motion for summary judgment, the
10 Ninth Circuit has held that Plaintiff must be concurrently provided the appropriate
11 warnings under *Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See
12 *Woods v. Carey*, 684 F.3d 934, 940 (9th Cir. 2012).**

13 4. Plaintiff's opposition to the dispositive motion shall be filed with the Court
14 and served on Defendants no later than **twenty-eight (28) days** from the date Defendants'
15 motion is filed.

16 Plaintiff is also advised to read Rule 56 of the Federal Rules of Civil Procedure and
17 *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding party opposing summary judgment
18 must come forward with evidence showing triable issues of material fact on every essential
19 element of his claim). Plaintiff is cautioned that failure to file an opposition to
20 Defendants' motion for summary judgment may be deemed to be a consent by Plaintiff to
21 the granting of the motion, and granting of judgment against Plaintiff without a trial. See
22 *Ghazali v. Moran*, 46 F.3d 52, 53–54 (9th Cir. 1995) (per curiam); *Brydges v. Lewis*, 18
23 F.3d 651, 653 (9th Cir. 1994).

24 5. Defendants shall file a reply brief no later than **fourteen (14) days** after
25 Plaintiff's opposition is filed.

26 6. The motion shall be deemed submitted as of the date the reply brief is due.
27 No hearing will be held on the motion unless the Court so orders at a later date.

1 7. All communications by the Plaintiff with the Court must be served on
2 Defendants, or Defendants' counsel once counsel has been designated, by mailing a true
3 copy of the document to Defendants or Defendants' counsel.

4 8. Discovery may be taken in accordance with the Federal Rules of Civil
5 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local
6 Rule 16-1 is required before the parties may conduct discovery.

7 9. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the
8 court informed of any change of address and must comply with the court's orders in a
9 timely fashion. Failure to do so may result in the dismissal of this action for failure to
10 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

11 10. Extensions of time must be filed no later than the deadline sought to be
12 extended and must be accompanied by a showing of good cause.

13 **IT IS SO ORDERED.**

14 Dated: May 3, 2023


BETH LABSON FREEMAN
United States District Judge